



January 16, 2002

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health & Mental Retardation
Post Office Box 12668
Austin, Texas 78711-2668

OR2002-0272

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 157459.

The Corpus Christi State School, a component of the Texas Department of Mental Health and Mental Retardation (the "department") received a written request for all records pertaining to the investigation of an employee's complaint of discrimination and harassment. You contend that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code.

We note at the outset that the documents you submitted to our office as being responsive to the request are specifically made public under section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter *unless they are expressly confidential under other law*:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1) (emphasis added). The requested investigation report is expressly made public under section 552.022(a)(1) and may be withheld only to the extent it is made confidential under other law or is excepted from public disclosure under section 552.108 of the Government Code. Although you argue that the requested information is

excepted under section 552.103 of the Government Code, this provision is a discretionary exception and therefore is not "other law" for purposes of section 552.022.¹ Consequently, the department may not withhold any of the requested information pursuant to section 552.103 of the Government Code.

On the other hand, you also contend that the identities of witnesses contained in the investigation report are confidential under other law and therefore must be withheld from the public under section 552.101 of the Government Code. Specifically, you contend that the witnesses' identities are protected by common law privacy. Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976) (common law privacy protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and is of no legitimate concern to the public).

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common law privacy doctrine to files of an administrative investigation of allegations of sexual harassment in the workplace and concluded that individual witness statements and the identities of those witnesses were protected from public disclosure under common law privacy. After reviewing the information at issue here, however, we conclude that *Ellen* is inapposite in this instance. Unlike the information before the court in *Ellen*, the information at issue here does not concern an allegation of sexual harassment, but rather appears to relate to charges of racism. Consequently, the analysis found in *Ellen* is inapplicable here. Furthermore, we believe that there is a legitimate public interest in allegations of racism in the workplace. *Cf.* Open Records Decision No. 444 (1986) (public has legitimate interest in knowing reasons for dismissal, demotion, promotion, or resignation of public employees). We have, however, identified some information that implicates the privacy interests of one employee. We have marked the information the department must withhold pursuant to section 552.101 in conjunction with the common law right of privacy. The remaining information you submitted to our office must be released, with the following possible exceptions.

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 549 at 6 (1990) (governmental body may waive informer's privilege), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

Section 552.117(1) of the Government Code requires that the department withhold an employee's home address, home telephone number, social security number, and information that reveals whether the employee has family members, but only if the employee elected to keep this information confidential in accordance with section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(1) must be determined at the time the request for the information is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, in order to withhold section 552.117(1) information from the public, a proper election must be made prior to the receipt of the request for information. In this instance, if the respective employees elected prior to the department's receipt of the records request to keep their section 552.117 information confidential in accordance with section 552.024, the department must withhold the information we have marked pursuant to section 552.117(1) of the Government Code. Otherwise, the department must release this information.²

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor

²Other information contained in the records at issue implicate the requestor's section 552.117 interests. However, the requestor has a special right of access to this information pursuant to section 552.023 of the Government Code. Consequently, we caution the department to request another decision from this office in the event it receives another request for these records in the future.

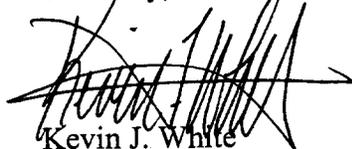
should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kevin J. White
Assistant Attorney General
Open Records Division

KJW/RWP/sdk

Ref: ID# 157459

Enc: Marked documents

c: Ms. Jessie L. Pulcher
3245 Reid Drive
Corpus Christi, Texas 78404
(w/o enclosures)